

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VIACOM INTERNATIONAL, INC., COMEDY
PARTNERS, COUNTY MUSIC
TELEVISION, INC., PARAMOUNT
PICTURES CORPORATION, and BLACK
ENTERTAINMENT TELEVISION, LLC,

Plaintiffs,

vs.

No. 07-CV-2203

YOUTUBE, INC., YOUTUBE, LLC,
and GOOGLE, INC.,

Defendants.

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THE FOOTBALL ASSOCIATION PREMIER
LEAGUE LIMITED, BOURNE CO., et al.,
on behalf of themselves and
all others similarly situated,

Plaintiffs,

vs.

No. 07-CV-3582

YOUTUBE, INC., YOUTUBE, LLC,
and GOOGLE, INC.,

Defendants.

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HIGHLY CONFIDENTIAL
VIDEOTAPED DEPOSITION OF DAVID DRUMMOND
SAN FRANCISCO, CALIFORNIA
THURSDAY, FEBRUARY 12, 2009
Job No.: 16392

1 DAVID DRUMMOND

2 FEBRUARY 12, 2009

3 9:16 A.M.

4
5 HIGHLY CONFIDENTIAL VIDEOTAPED DEPOSITION OF DAVID
6 DRUMMOND, at SHEARMAN & STERLING, LLP 525 Market Street,
7 Suite 1500, San Francisco, California, pursuant to
8 notice, before me, KATHERINE E. LAUSTER, CLR, CRR, RPR,
9 CSR License No. 1894.
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1 DAVID DRUMMOND

2 A P P E A R A N C E S:

3
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23 Also Present:

24 CATHERINE LACAVERA, Google

25 STUART PETTIGREW, Videographer

DAVID DRUMMOND

1

2 10:11:10 Suisse, First Boston?

3 10:11:12 A. Yes.

4 10:11:13 Q. And George Boutros headed -- was the head
5 10:11:15 banker?

6 10:11:16 A. Yes, that's true.

7 10:11:17 Q. And he had a partner named Storm Duncan,
8 10:11:19 who worked with you as well?

9 10:11:22 A. Yes.

10 10:11:22 Q. And have they been your long-standing M&A
11 10:11:27 advisors with Google?

12 10:11:29 A. I'm not sure it's accurate to call them
13 10:11:31 "long-standing." We haven't used bankers for many
14 10:11:36 M&A transactions, but we have used them twice.

15 10:11:40 Q. What other deal did you use them on?

16 10:11:43 A. The DoubleClick transaction.

17 10:11:44 Q. And did they render advice to the Google
18 10:11:47 board of directors in connection with the YouTube
19 10:11:50 acquisition?

20 10:11:51 A. They rendered a fairness opinion.

21 10:11:54 Q. Okay. Did they also address the board?

22 10:11:56 A. In the context of delivering that fairness
23 10:11:59 opinion, yes, I believe they did.

24 10:12:01 Q. And did they prepare a book for
25 10:12:02 distribution to the board?

1 DAVID DRUMMOND

2 10:12:04 A. I believe that they did.

3 10:12:05 Q. Now, so the ladies and gentlemen of the
4 10:12:08 jury can understand, would you tell them what a -- a
5 10:12:11 fairness opinion is?

6 10:12:14 A. Well, my understanding of a fairness
7 10:12:16 opinion is a -- an opinion rendered by a financial
8 10:12:20 expert or a firm experienced in financial matters,
9 10:12:24 such as an investment bank, rendering an opinion as
10 10:12:29 to the -- the fairness to the shareholders of -- of
11 10:12:35 an acquisition from a financial point of view.

12 10:12:40 Q. And prior to rendering that opinion, is it
13 10:12:43 your understanding that the investment bank performs
14 10:12:46 analytical analysis in connection with the
15 10:12:49 acquisition?

16 10:12:53 A. Yes, it is.

17 10:12:54 Q. Now, you personally approached YouTube in
18 10:12:57 the first instance; is that correct?

19 10:13:01 A. In the round of conversations that
20 10:13:04 ultimately led to the acquisition, that's true.

21 10:13:06 Q. Now, when the negotiations began, whose
22 10:13:09 idea was it within Google to approach YouTube?

23 10:13:16 A. I don't recall whether the idea started
24 10:13:17 with any particular individual. I know I and some
25 10:13:24 others thought that -- that it was a -- a worthwhile

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10:17:39 2 Q. So it's your recollection that this was a
10:17:41 3 pricing issue, as far as he was concerned? It was
10:17:44 4 too expensive?

10:17:45 5 A. (No audible response.)

10:17:46 6 Q. An acquisition of YouTube would be too
10:17:48 7 expensive?

10:17:49 8 A. I -- I recall him having concerns about a
10:17:52 9 price.

10:17:52 10 Q. And no other concerns?

10:17:54 11 A. I don't remember what other concerns he
10:17:56 12 might have had.

10:17:57 13 Q. Now -- now, is it fair to say that your
10:18:52 14 initial offer to YouTube was in the range of
10:18:56 15 \$615 million?

10:19:00 16 A. Yes, I think that's correct.

10:19:02 17 Q. And the final offer added a billion
10:19:07 18 dollars to that, basically?

10:19:09 19 A. Yes.

10:19:10 20 Q. Now, I take it that the acquisition was
10:19:16 21 embodied in a merger agreement?

10:19:18 22 A. Yes, that's correct.

10:19:20 23 MR. BASKIN: And let me show you, just so
10:19:22 24 we're working off the same page what we'll mark as
10:19:39 25 Drummond 2.

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10:19:40 2 (Drummond Exhibit Number 2 was marked for
10:19:40 3 identification.)

10:19:40 4 MR. BASKIN: I think that's about as many
10:19:40 5 as we've got.

10:20:10 6 BY MR. BASKIN:

10:20:10 7 Q. Is that a copy of the merger agreement,
10:20:13 8 Mr. Drummond?

10:20:13 9 A. It appears to be.

10:20:15 10 Q. And did you work on the acq- --
10:20:16 11 negotiation of the merger agreement?

10:20:18 12 A. Yes, I did.

10:20:19 13 Q. How about the scrivening of the merger
10:20:22 14 agreement? Did you work on the scrivening of the
10:20:25 15 merger agreement?

10:20:26 16 MR. SCHAPIRO: You might define
10:20:27 17 "scrivening" for the ladies and gentlemen of the
10:20:29 18 jury.

10:20:30 19 BY MR. BASKIN:

10:20:30 20 Q. Do you know what "scrivening" means,
10:20:33 21 Mr. Drummond?

10:20:34 22 A. Yes.

10:20:34 23 Q. Did you work on the scrivening of the
10:20:37 24 merger agreement?

10:20:38 25 A. I didn't actually write the language, if

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10:20:40 2 that's what you mean, but I was -- certainly
10:20:42 3 reviewed drafts, and reviewed provisions, and was
10:20:45 4 asked to comment on them.

10:20:46 5 Q. Now, before you entered into this
10:20:49 6 agreement, and before you submitted the transaction
10:20:53 7 to your board for its approval, would I be correct
10:20:57 8 that Google performed a due diligence investigation
10:21:00 9 of YouTube's operations and financing conditions?

10:21:03 10 A. Yes, that's true.

10:21:04 11 Q. And that's customary, isn't it, to perform
10:21:07 12 a due diligence?

10:21:08 13 A. Yes.

10:21:09 14 Q. And maybe you could tell the ladies and
10:21:10 15 gentlemen of the jury what a due diligence is.

10:21:15 16 A. Well, a due diligence investigation is
10:21:18 17 generally what a company will do when they're
10:21:22 18 attempting -- when you're going to invest the
10:21:25 19 company funds, or, for instance, in acquiring a
10:21:29 20 company, to review the -- the asset that you're
10:21:32 21 buying, the company that you're buying, and try to
10:21:35 22 understand its -- its business, and whether or not
10:21:42 23 it's worth some particular amount of money that is
10:21:45 24 proposed to be paid for it.

10:21:48 25 Q. And it is generally your practice -- your

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10:21:50 2 experience that the target company makes available
10:21:54 3 to the would-be acquirer the information the
10:21:59 4 would-be acquirer wants to see?

10:22:01 5 A. Yes, that's my understanding.

10:22:03 6 Q. And is it fair to say that's what happened
10:22:05 7 here as well?

10:22:07 8 A. Yes, that's correct.

10:22:07 9 Q. And prior to the acquisition, did you --
10:22:09 10 strike that.

10:22:10 11 Were a large array of documents set up in
10:22:15 12 what might be characterized as a war room?

10:22:20 13 A. (No audible response.)

10:22:21 14 Q. Or would you -- would you use a different
10:22:23 15 phrase?

10:22:25 16 A. I don't -- I don't recall the -- the
10:22:27 17 actual venue, or how things were set up. I know
10:22:30 18 that they -- we spent a fair bit of time at Wilson
10:22:34 19 Son- -- Sonsini, both negotiating the transaction
10:22:38 20 and -- and review -- you know, performing due
10:22:42 21 diligence.

10:22:43 22 Q. And did you have access to the senior
10:22:46 23 executives of YouTube to ask them questions?

10:22:49 24 A. Yes, we did.

10:22:50 25 Q. And did you do that from time to time in

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10:22:52

2

the course of the due diligence?

10:22:53

3

A. Yes, we did.

10:22:54

4

Q. And in connection with that, do you recall

10:22:57

5

any question you asked them that they refused to

10:22:59

6

answer?

10:23:01

7

A. No, I don't.

10:23:02

8

Q. Do you recall -- strike that.

10:23:04

9

Who else, other than -- I take it you

10:23:06

10

weren't doing all the due diligence yourself?

10:23:09

11

A. That's correct.

10:23:09

12

Q. Who else worked on due diligence in -- in

10:23:12

13

addition to you, sir?

10:23:15

14

A. At Google, Matt Sucherman. He was an

10:23:20

15

in-house Google lawyer who then was in charge of our

10:23:24

16

corporate law group.

10:23:29

17

We also had some other Google lawyers

10:23:35

18

involved in the process. Alex MacGillivray, Glenn

10:23:44

19

Brown, our outside counsel was Simpson Thatcher.

10:23:52

20

There were at least two lawyers from there.

10:23:58

21

Q. How about nonlawyers who participated in

10:24:01

22

due diligence? I assume Credit Suisse First Boston

10:24:08

23

did; is that true?

10:24:10

24

A. They -- they didn't play as much of a role

10:24:12

25

in what I would call the due diligence, but in terms

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10:24:17 2 of other Google people, I know that Salar Kamangar
10:24:30 3 was one of our product managers. I believe he was a
10:24:33 4 VP at that time.

10:24:34 5 Q. How about Sean Dempsey?

10:24:37 6 A. Of course. I'm forgetting Sean Dempsey,
10:24:39 7 who was -- worked on the corporate development team,
10:24:42 8 and Salman Ullah, who was his -- his boss, who ran
10:24:46 9 -- at the time, ran corporate development for
10:24:50 10 Google, who reported to me.

10:24:51 11 Q. Now, is there also an individual named
10:25:00 12 James Kim? That sounds familiar to you?

10:25:03 13 A. Yes.

10:25:04 14 Q. A banker at Credit Suisse?

10:25:07 15 A. (Witness nods head.)

10:25:08 16 Q. Is that correct?

10:25:09 17 A. I won't dispute that. I think that's
10:25:11 18 true.

10:25:12 19 Q. Well, it may not be now, but he was then;
10:25:14 20 correct?

10:25:15 21 A. That sounds correct, but I -- I don't
10:25:17 22 remember him well.

10:25:18 23 Q. And did he also participate in the due
10:25:21 24 diligence?

10:25:21 25 A. He may have, but I -- I don't remember his

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2 12:25:46 payments it should make arising out of copyright
3 12:25:49 litigation?

4 12:25:50 A. I -- I don't remember what our initial
5 12:25:52 position is. I remember that we agreed on a --
6 12:25:55 on -- on a -- what's called a -- you know, a -- a
7 12:26:00 cap or an amount, and expresses a percentage of the
8 12:26:04 purchase price.

9 12:26:05 Q. Now, in particular, if you'll turn to
10 12:26:09 page -- to the exhibit -- to the merger agreement.
11 12:26:15 I don't remember what exhibit number is. If you
12 12:26:19 would -- we'll count down for a second --

13 12:26:22 MS. MERINGOLO: Exhibit 2.

14 12:26:23 BY MR. BASKIN:

15 12:26:23 Q. Exhibit 2. So I understand how this
16 12:26:25 works, sir, if you first turn to page 61 and 62 of
17 12:26:34 the merger agreement --

18 12:26:38 MR. SCHAPIRO: Sorry. Are you giving
19 12:26:39 Bates numbers or the page numbers?

20 12:26:41 BY MR. BASKIN:

21 12:26:41 Q. Page numbers of the document. It would be
22 12:26:44 Bates numbers -123 and -124.

23 12:27:00 Section 9.2 sets up indemnification by the
24 12:27:06 company stockholders, the company being YouTube;
25 12:27:11 right, sir?

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2 12:27:12 A. Yes.

3 12:27:12 Q. Then among the items, I -- that were to be

4 12:27:15 identify -- indemnified, if you go to the top of

5 12:27:19 page 62, was any indemnified copyright action,

6 12:27:24 including any damages arising prior to or after the

7 12:27:29 effective time; right, Mr. Drummond?

8 12:27:33 A. Yes, I see that.

9 12:27:34 Q. Now, on page 17 of the agreement, as I

10 12:27:36 understand it, an escrow account was set up; right,

11 12:27:47 sir?

12 12:27:48 A. Yes.

13 12:27:48 Q. And if I understand how this functioned,

14 12:27:50 under the escrow account 12.5 percent of the

15 12:27:58 aggregate share consideration, that is, 12.5 percent

16 12:28:06 of \$1.65 billion, was to be set up in an escrow

17 12:28:13 account; correct?

18 12:28:15 A. That's correct.

19 12:28:16 Q. So that's roughly -- what? 200 --

20 12:28:19 \$200 million was to be escrowed?

21 12:28:30 A. Sorry. It's 12.5 percent of -- it's --

22 12:28:32 the -- the shares.

23 12:28:32 Q. Okay.

24 12:28:33 A. This is a share deal.

25 12:28:37 Q. Now, then, if I'm right, if you turn to

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2 12:28:45 page 64, and the -- and it continues on page 65,

3 12:29:06 Section 9.6(b) limited the actual indemnification

4 12:29:17 for copyright violations to 5 percent of the total

5 12:29:23 number of escrow shares initially deposited in the

6 12:29:28 escrow account; right, Mr. Drummond?

7 12:29:30 A. Yes, I see that.

8 12:29:32 Q. So then roughly do the math. You would

9 12:29:40 take \$1.65 billion and multiply that by

10 12:29:46 12.5 percent, which I think is \$206 million, and

11 12:29:53 then you would take 5 percent of that, and so the

12 12:29:55 initial escrowed amount for copyright violations was

13 12:30:02 approximately \$10 million, as set forth in this

14 12:30:05 agreement; correct?

15 12:30:07 A. That would be the -- probably the better

16 12:30:10 reading of the language in the original agreement,

17 12:30:13 yes.

18 12:30:14 Q. Well, it's the only reading, but you --

19 12:30:16 there's a scrivener's error; right?

20 12:30:21 A. That's correct.

21 12:30:22 Q. And this is where the scrivener erred;

22 12:30:26 correct?

23 12:30:26 A. This is where the error took place, yes.

24 12:30:29 Q. Now, the net effect was --

25 12:30:32 Mark this as Exhibit --

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12:30:44 2 THE REPORTER: 11.

12:30:45 3 MR. BASKIN: 11.

12:30:51 4 (Drummond Exhibit Number 11 was marked for
12:30:51 5 identification.)

12:31:31 6 BY MR. BASKIN:

12:31:32 7 Q. Let me ask you to look at Exhibit 11,
12:31:34 8 Mr. Drummond.

12:31:52 9 Does Exhibit 11 appear to you to be a --
12:31:56 10 e-mail communicating to the Sequoia folks the fully
12:32:02 11 executed amendment to the merger agreement?

12:32:06 12 A. Yes, that's what it appears to be.

12:32:08 13 Q. And have you seen this prior to today,
12:32:10 14 sir?

12:32:13 15 A. (No audible response.)

12:32:14 16 Q. By that, I -- by "this," I mean have you
12:32:17 17 seen the amendment prior to today?

12:32:19 18 A. Yes.

12:32:19 19 Q. I'm not talking about the actual
12:32:21 20 transmittal to Sequoia guys.

12:32:23 21 A. Yes, I believe I've seen the -- the
12:32:24 22 amendment.

12:32:25 23 Q. Now, if I understand what happened by this
12:32:27 24 amendment, Section 9.6(b) -- well, strike that.

12:32:33 25 It starts by having a couple whereas

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12:32:36 2 clauses, the second one which provides that this
12:32:41 3 corrects a mutual mistake resulting from a
12:32:44 4 scrivener's error; correct?

12:32:46 5 A. That's correct.

12:32:48 6 Q. And the mistake was in Section 9.6(b), as
12:32:55 7 we discussed before; right, Mr. Drummond?

12:32:57 8 A. That's right.

12:32:58 9 Q. And basically, what this does, if I
12:33:01 10 understand it correctly, it changes the size of the
12:33:07 11 escrow available to Google for copyright
12:33:11 12 infringement actions from 5 percent of the total
12:33:17 13 number of escrowed shares, to 5 percent of the
12:33:23 14 aggregate share price -- aggregate share
12:33:27 15 consideration; is that right?

12:33:28 16 A. That's right.

12:33:29 17 Q. So now, instead of having 5 percent of
12:33:32 18 approximately, I believe, \$200 million available as
12:33:41 19 an indemnification for copyright infringement, this
12:33:45 20 amendment makes available 5 percent of
12:33:48 21 \$1.65 billion; correct?

12:33:51 22 A. That's correct.

12:33:53 23 Q. So basically, it increased the escrow from
12:34:02 24 about \$10.3 million available for copyright
12:34:07 25 infringement actions to \$82.5 million? Something in

1 DAVID DRUMMOND

12:34:12 2 that range, sir?

12:34:15 3 A. Well, it corrected the error in the
12:34:17 4 original agreement.

12:34:18 5 Q. And the effect of correcting the error was
12:34:20 6 basically the indemnification flowing to Google
12:34:23 7 increased by 800 percent?

12:34:25 8 A. Well, I guess I would argue it never
12:34:28 9 increased. The -- the agreement was the agreement,
12:34:31 10 and it was just a -- incorrectly memorialized.

12:34:36 11 Q. Now, what do you recall occasioned the
12:34:38 12 discovery of the scrivener's error?

12:34:46 13 A. You know, I don't -- I don't recall who
12:34:49 14 actually noticed it. It was brought to my
12:34:52 15 attention, I believe, by Matt Sucherman who had
12:34:58 16 worked on -- on the deal.

12:35:01 17 Q. Well, the amendment was executed, it looks
12:35:04 18 like, approximately April 18th, 2007; is that
12:35:07 19 correct?

12:35:07 20 A. That's what it says.

12:35:08 21 Q. And Viacom filed this lawsuit in March of
12:35:13 22 2006; is that right, Mr. Drummond?

12:35:18 23 A. That sounds generally correct. I don't
12:35:20 24 know. I'd have to refer to something to -- to get
12:35:22 25 that exact --

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12:35:24 2 Q. And was it the commencement of the Viacom
12:35:26 3 litigation that occasioned the discovery of the
12:35:30 4 scrivener's error?

12:35:33 5 A. I don't know if it was -- if it was or
12:35:35 6 not.

12:35:36 7 Q. You have no memory of discussing with
12:35:39 8 anyone why the scrivener error happened? Strike
12:35:45 9 that.

12:35:48 10 Now, when your team was performing -- I
12:36:13 11 want to move on in a second to what were some of
12:36:24 12 Google Video's practices prior to the acquisition of
12:36:27 13 YouTube, but before doing that, I want to return one
12:36:31 14 more time to the issue of whether YouTube was
12:36:38 15 monetizing or selling ads around the watch pages.

12:36:43 16 And let me hand you, sir, what we will
12:36:45 17 mark as Exhibit 12.

12:37:11 18 (Drummond Exhibit Number 12 was marked for
12:37:11 19 identification.)

12:37:34 20 BY MR. BASKIN:

12:37:35 21 Q. Mr. Drummond, have you seen Exhibit 12
12:37:39 22 prior to today?

12:37:40 23 A. I don't recall seeing it. And you'll note
12:37:43 24 that it doesn't appear to have been sent to me.

12:37:47 25 Q. Correct.

1

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15:34:12

2

owners, and I was aware that EMI was one of the --

15:34:17

3

the -- the parties we were talking to.

15:34:19

4

Q. And is it a fact that YouTube was

15:34:21

5

unwilling to offer this to any content owner, in and

15:34:25

6

around March 2007, who did not enter into a license

15:34:29

7

agreement with YouTube?

15:34:31

8

A. I don't recall what -- whether that was

15:34:33

9

true in a categorical fashion. I -- what I recall

15:34:37

10

is that we were going to undertake to do this with

15:34:41

11

people who were working with us.

15:34:43

12

Q. Can you offer the ladies and gentlemen of

15:34:45

13

the jury the name of one content owner in 2007 who

15:34:52

14

did not enter into a license agreement with YouTube

15:34:56

15

for whom you were willing to do audio

15:34:59

16

fingerprinting?

15:35:00

17

A. No, I can't name a -- any content owner.

15:35:03

18

Q. Are you aware of any technological reason

15:35:06

19

why you could not include companies that did not

15:35:10

20

enter into licenses with you within audio

15:35:14

21

fingerprinting?

15:35:15

22

A. I'm not a technologist, so I'm not

15:35:19

23

particularly qualified to answer that question.

15:35:22

24

Q. Did you have --

15:35:23

25

A. I'm not aware of -- of whether it's

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15:35:26 2 technologically possible or impossible. I -- my
15:35:31 3 guess is that it's -- well, I'm not going to guess.

15:35:35 4 Q. If Viacom was willing to provide your
15:35:37 5 fingerprint vendor with its fingerprints of its
15:35:41 6 videos, is there any reason Viacom could not have
15:35:44 7 been included in this program, Mr. Drummond?

15:35:47 8 MR. SCHAPIRO: Objection. Calls for
15:35:48 9 speculation.

15:35:53 10 THE WITNESS: I guess -- can you repeat
15:35:55 11 the question?

15:35:56 12 BY MR. BASKIN:

15:35:56 13 Q. If Viacom was prepared to provide its
15:36:00 14 fingerprints of its videos to Audio (sic) Magic or
15:36:04 15 any other vendor that YouTube was already using, is
15:36:09 16 there some reason you can think of why Viacom could
15:36:11 17 not have been included in this program along with
15:36:15 18 EMI?

15:36:16 19 A. At -- at what time period are you talking
15:36:19 20 about?

15:36:20 21 Q. In and around March of 2007.

15:36:23 22 A. As I testified before, at that time I'm
15:36:29 23 not -- I don't recall whether there would have been
15:36:32 24 a reason.

15:36:32 25 As I said, we -- we were working with --

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15:36:36 2 we were willing to do these things with partners who
15:36:40 3 were going to work with us. So assuming Viacom was
15:36:42 4 going to work with us, we would have -- they could
15:36:45 5 have availed themselves of the same thing.

15:36:48 6 Q. And by "work with" you, do you mean
15:36:49 7 provide you with fingerprints, or do you mean grant
15:36:52 8 you a license?

15:36:53 9 A. Work with us to provide -- provide us the
15:36:57 10 content, and I don't think most -- most companies
15:36:59 11 wouldn't be willing to -- to provide us the content
15:37:02 12 without an agreement, but --

15:37:03 13 Q. Do you mean if Viacom -- Viacom had to
15:37:07 14 agree to provide you with its content in order to
15:37:11 15 avail itself of video fingerprinting? Is that what
15:37:16 16 you testified?

15:37:17 17 A. At some point I believe that was true. I
15:37:19 18 can't pinpoint the time.

15:37:21 19 Q. Now, if Viacom was already providing its
15:37:26 20 fingerprinting to Audio (sic) Magic with respect to
15:37:29 21 other websites, do you know how much it would have
15:37:34 22 cost YouTube to include Viacom in the program that
15:37:41 23 it allowed for EMI?

15:37:44 24 A. No, I don't, nor am I aware that Viacom
15:37:47 25 was providing anything to any- -- anyone.

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2 15:59:01 Could you read to yourself the -- the
3 15:59:03 paragraph begins:

4 15:59:06 Deployment of such preventive measures
5 15:59:09 cannot be conditioned on first reaching a
6 15:59:12 commercial agreement.

7 15:59:13 Do you see that, Mr. Drummond?

8 15:59:39 A. Yes, I -- I've read that paragraph.

9 15:59:41 Q. Now, Mr. Cotton seemed to believe that it
10 15:59:44 was your, Google's, express policy to offer its
11 15:59:49 advanced technology only to copyright owners that
12 15:59:54 submit to YouTube's commercial demands. Was that an
13 15:59:59 accurate characterization of your position?

14 16:00:01 MR. SCHAPIRO: Objection as to what
15 16:00:02 Mr. Cotton believes.

16 16:00:04 THE WITNESS: Yeah, I don't know what
17 16:00:05 Mr. -- I can't comment on what Mr. Cotton believes.
18 16:00:08 As I stated -- as I said before, we had a -- our
19 16:00:12 position was that we were -- we were offering the
20 16:00:14 techniques that we've discussed before to help
21 16:00:18 content owners identify content to partners.

22 16:00:26 BY MR. BASKIN:

23 16:00:26 Q. Meaning people that entered into licenses
24 16:00:29 with you?

25 16:00:29 A. People that we -- we had business

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2 16:00:31 relationships with.

3 16:00:32 Q. And if an NBC or Viacom was unwilling to
4 16:00:36 license their content to you --

5 16:00:38 A. Well, we knew that it was their view that,
6 16:00:40 you know, as expressed in this letter, that we
7 16:00:43 needed to -- to deploy this technology to meet legal
8 16:00:47 obligations. Obviously, we disagreed with that.

9 16:00:50 Q. And I take it, in fact, you did not deploy
10 16:00:52 the technology for either Viacom or NBC; is that
11 16:00:57 correct?

12 16:00:57 A. I don't recall that we did.

13 16:01:02 Q. Now, by the way, in reaching that
14 16:01:04 conclusion that you had no obligation to do so, was
15 16:01:11 that on advice of counsel, or how did you come about
16 16:01:15 that -- that conclusion?

17 16:01:15 A. It's privileged, I believe. It was on
18 16:01:17 advice of counsel.

19 16:01:36 MR. BASKIN: And I'll first direct this to
20 16:01:53 your attorney, but do you want to tell us which
21 16:01:55 counsel gave that advice that you're relying on?

22 16:01:59 MR. SCHAPIRO: No.

23 16:02:05 MR. BASKIN: Okay. Now -- after Google
24 16:03:33 acquired YouTube -- just one second. Oh, here it
25 16:04:50 is.

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2 16:10:54 program to assist it in its take-down notice that it
3 16:11:00 sent to you in February 2007?

4 16:11:03 A. No, I wasn't aware of that, or don't
5 16:11:06 recall being aware of that.

6 16:11:09 Q. And you see where the -- apparently the
7 16:11:13 technical people say:

8 16:11:15 Technically it is do-able. It's not hard to
9 16:11:18 create a new content owner account and set
10 16:11:21 them up.

11 16:11:22 See that, sir?

12 16:11:23 A. Well, you're assuming that Matthew Liu was
13 16:11:27 a technical person. Since I don't know who he was,
14 16:11:31 I don't know that we can assume that, but I -- I see
15 16:11:33 the first two lines of the e-mail.

16 16:11:35 Q. Was there a -- intentional decision on the
17 16:11:38 part of Google and YouTube not to include Viacom
18 16:11:41 within the CYC tool in and around February 2007,
19 16:11:44 because it would not enter into a license agreement
20 16:11:48 with YouTube?

21 16:11:51 A. I don't recall whether it was a specific
22 16:11:53 decision. As I've told you before, we had a -- we
23 16:11:55 had a -- an approach where we were going to offer
24 16:11:58 this new -- the CYC tool to partners.

25 16:12:16 I'd like a --

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2 16:36:53 A. Well, I -- as I sit here today, I don't
3 16:36:55 have any reason to take issue with it or validate
4 16:37:00 it.

5 16:37:04 Q. Now, if a member -- if the runner of one
6 16:37:07 of these private sites or the owner of one of these
7 16:37:10 private sites -- I'm not sure what the proper
8 16:37:12 terminology is. Do you know what it is?

9 16:37:14 A. No, I don't.

10 16:37:16 Q. Well, why don't we agree on "operator" of
11 16:37:19 one of the private sites? Is that --

12 16:37:21 A. That's fine.

13 16:37:22 Q. Okay. If the operator of one of these
14 16:37:25 private sites decides to upload entire movies or
15 16:37:33 television shows onto the private sites, is there
16 16:37:39 any way a content owner can access these private
17 16:37:45 accounts to take down those movies or TV --
18 16:37:48 television shows?

19 16:37:50 A. I'm not aware of ways in which they could
20 16:37:53 do that.

21 16:37:56 Q. Now, does YouTube today use its CYC-type
22 16:38:31 technology to scan private accounts for violations
23 16:38:40 of either policy or copyright?

24 16:38:42 A. You know, I'm not -- I'm not -- I don't
25 16:38:46 actually know whether we do that or not.